Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Restoring Internet Freedom	)	WC Docket No. 17-108
	)	
	)	

COMMENTS OF COX COMMUNICATIONS, INC.

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July 17, 2017

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Cox Communications, Inc. ("Cox") respectfully submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") adopted by the Commission on May 18, 2017.[1]

INTRODUCTION AND SUMMARY

Cox is unwaveringly committed to maintaining Internet freedom as a matter of sound business and public policy. Regardless of any regulatory requirements, Cox will continue to provide unimpeded access to all of the Internet content and services that its customers desire—without throttling or blocking lawful traffic or engaging in unreasonable discrimination. Indeed, Cox continued to abide by the Commission's 2010 open Internet rules even after they were overturned in court, despite the absence of any binding requirements.[2]

While Cox has consistently supported maintaining the free and open Internet, Cox has been equally consistent in opposing heavy-handed Title II regulation with respect to broadband Internet access service ("BIAS"). Under the light-touch framework that was in place for many

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1 *Restoring Internet Freedom*, Notice of Proposed Rulemaking, WC Docket No. 17-108, FCC 17-60 ¶ 1 (rel. May 23, 2017) ("*NPRM*").

2 *See* Statement of Jennifer Hightower, *Cox Disagrees with FCC Approval of Heavy Regulations for Broadband*, Cox News Releases (Feb. 26, 2015), http://newsroom.cox.com/2015-04-26-Cox-Disagrees-with-FCC-Approval-of-Heavy-Regulations-for-Broadband.

years preceding the *Title II Order*,[3] Cox continually increased its broadband speeds, introduced innovative service enhancements, and extended connectivity to more consumers. But Title II jeopardizes the continuation of that remarkable progress by introducing debilitating uncertainty and the prospect of regulatory second-guessing of Cox's good-faith business judgments. And there is simply no need to saddle BIAS providers with utility-style regulation designed for the telephone monopolies of the 1930s. To the contrary, the entire Internet ecosystem thrived under the bipartisan, light-touch, Title I regulatory framework that ensured reasonable conduct without undercutting BIAS providers' incentives to make the substantial infrastructure investments required to deliver robust and ubiquitous Internet connectivity. Under that consensus light-touch approach, the nation witnessed unparalleled technological advancements and immeasurable consumer welfare gains. Unfortunately, in adopting the *Title II Order*, the Commission sharply reversed course and destabilized the broadband ecosystem by abandoning an information-service classification that the Supreme Court upheld and the Commission repeatedly reaffirmed. The imposition of common carrier mandates has already slowed investment and stymied innovation in the broadband marketplace and threatens even greater long-term harms if left in place.

The shadow cast by Title II is particularly apparent for companies like Cox Enterprises, which not only participates in the communications sector through Cox Communications but also owns and operates businesses in several less regulated areas, including automotive services, newspaper publishing, and digital media. In deciding how to allocate finite capital resources across these businesses, Cox Enterprises must take into account the regulatory climate, among other factors, in assessing the investment risks. The imposition of Title II on Cox's broadband business unquestionably fosters uncertainty that potentially raises the cost of capital and hinders

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[3] *See Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) ("*Title II Order*").

investment in broadband infrastructure, thus jeopardizing the very same broadband deployment goals the Commission seeks to advance. Cox is proud of the enormous commitment it has made to its broadband business, but the company's ability to continue these investments and further enhance its services depends on a hospitable regulatory climate.

The best way to safeguard Internet openness while promoting continued investment and innovation is for Congress to enact legislation that enshrines a narrowly tailored, light-touch regulatory framework for BIAS. The Commission has struggled to adopt a durable and appropriately tailored solution using regulatory tools that are decades old and intended to address different services. The broadband industry, along with the broader economy, consumers, and the Commission, will benefit significantly from the certainty and stability that congressional action will foster, in contrast to toggling between different jurisdictional theories and recurring rounds of litigation that perpetuate uncertainty and exhaust finite government resources.

As legislation remains under consideration, however, the Commission can take important action to eliminate the harms associated with overbroad Title II regulation, as the NPRM proposes, by restoring the information-service classification for BIAS that established a remarkably successful foundation for investment and innovation by network operators and edge providers alike. The relevant decisions by the Supreme Court and the D.C. Circuit leave no doubt that the Commission may return to that Title I classification, both because BIAS entails a combination of transmission and information-processing capabilities as a functional matter, and because the light-touch policies that flow from Title I are more conducive to the broadband investment and deployment goals established by Congress and the Commission.

Once the Commission returns to the appropriate information service classification for BIAS, it will have a number of options for safeguarding open Internet principles in a manner that

avoids the chilling effects of Title II. Importantly, broadband providers have strong, market-based incentives to refrain from engaging in blocking, throttling, or other anticompetitive conduct that would only alienate consumers and drive them to switch to competitors with more consumer-friendly offerings. Not surprisingly, purported violations of open Internet principles have been vanishingly rare. As a result, there is no demonstrated need for the Commission to impose any prescriptive regulatory mandates. Nevertheless, if the Commission determines that the benefits of narrowly tailored regulation would exceed the costs, Cox has previously recognized the Commission's authority to adopt a regulatory backstop, and Cox remains supportive of an appropriate light-touch mechanism to ensure industry-wide adherence to open Internet principles.

One option—particularly given the absence of evidence of market power or market failure—is for broadband providers to commit publicly to the core principles of Internet openness, potentially in their terms of service or in an industry code of conduct. This approach would subject broadband providers to enforcement action by the Federal Trade Commission ("FTC") if they violated such principles, pursuant to Section 5 of the Federal Trade Commission Act. This approach would capitalize on the FTC's broad expertise with respect to competition, consumer protection, and privacy, and would enable a single regulator to ensure that all participants in the broadband ecosystem—broadband providers and edge providers alike—are subject to a common regulatory framework prohibiting unfair or deceptive practices.

Alternatively, if the Commission determines that industry commitments are insufficient, the Commission could choose to reinstate narrowly tailored bright-line rules under Section 706. The D.C. Circuit has held that Section 706 provides affirmative authority for the Commission to impose open Internet requirements, and the court provided a clear blueprint for how to impose

such measures without impermissibly treating information service providers as common carriers.[4] The Commission initially proposed to follow that blueprint before taking a wrong turn and subjecting BIAS providers to Title II regulation; it could return to its former plan if it determines there is a need for prescriptive rules.

Regardless of the approach the Commission ultimately pursues to safeguard openness, Cox urges the Commission to take steps to ensure that its framework is technologically neutral and appropriately tailored. First, any principles or rules should apply equally to fixed and mobile broadband services. Fixed and mobile services compete head to head in the marketplace, and differential obligations would cause significant competitive distortions and inefficiencies. Second, the Commission should reject the far-reaching and poorly defined General Conduct Standard adopted pursuant to Title II. That standard encapsulates the overregulation inherent in Sections 201 and 202 of the Act, and its vague and overly expansive nature restrains innovation and curtails the development of new products and services that would benefit consumers. Third, the Commission should limit the application of any new rules to mass market residential services. While the justifications for regulating mass market BIAS are uncertain at best, there is plainly no basis to extend regulation to enterprise services, specialized services (also known as non-BIAS data services), or Internet traffic-exchange arrangements. Finally, the Commission should ensure a consistent national framework by preempting state or local regulation of broadband services.

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4 *Verizon v. FCC*, 740 F.3d 623, 637, 657-58 (D.C. Cir. 2014) ("*Verizon*")

DISCUSSION

I. THE COMMISSION SHOULD RESTORE THE INFORMATION-SERVICE CLASSIFICATION FOR BIAS

The Commission's top priority in this proceeding should be to restore the longstanding classification of BIAS as an information service, which provided a remarkably successful foundation for the virtuous cycle of investment and innovation the Commission has sought to foster. For many years, before the *Title II Order*, the Commission was steadfast in classifying BIAS as an information service, based on repeated factual findings confirming that it includes the requisite information-processing capabilities (and not just pure transmission) and in light of a bipartisan commitment to ensuring a light-touch regulatory framework that promotes investment and innovation. The *Title II Order* was a radical departure from that consensus approach, but the fundamental reasonableness of the prior information service classification has not changed. The Commission has clear authority to reinstate the information service classification that the Supreme Court approved in *Brand X*,[5] and it should do so to restore the type of regulatory framework that will encourage sustained investments and promote innovation.

A. The Commission Has Clear Authority To Reclassify BIAS as an Information Service

Nothing in the *Title II Order* or the D.C. Circuit's decision in *USTelecom* imposes any constraint on the Commission's ability to restore the classification of BIAS as an information service. Moreover, the Supreme Court unequivocally held in *Brand X* that classifying BIAS as an information service reflects a reasonable interpretation of the Act,[6] and that holding remains the law of the land. In light of *Brand X*, *USTelecom* expressly rejected the argument that BIAS

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5 *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (*"Brand X"*).

6 *Id.* at 987-89.

"is unambiguously a telecommunications service."[7] Thus, the D.C. Circuit did not purport to—and, indeed, could not—hold that BIAS *must* be classified as a telecommunications service. Rather, the court held only that a telecommunications-service classification is *permissible*.[8] Indeed, in denying petitioners' requests for rehearing *en banc*, Judges Srinivasan and Tatel again confirmed in their concurring opinion that "the Act [leaves] the matter [of the classification of BIAS] to the agency's discretion."[9] Thus, while *USTelecom* held that the "the FCC could elect to treat broadband ISPs as common carriers . . . the agency did not have to do so."[10]

Moreover, the Commission can readily comply with the Administrative Procedure Act ("APA") in reclassifying BIAS as an information service. As discussed further in Section I.B below, the factual particulars of BIAS—which have not changed meaningfully since the Supreme Court considered them in *Brand X*—strongly support the conclusion that BIAS is an information service. The record from the rulemaking in 2014-15, together with the record that will be compiled in response to the instant NPRM, will provide ample evidentiary support to find that BIAS providers offer "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[11] Indeed, while not required to satisfy the definition, BIAS providers actually offer *all* of those capabilities. Relevant precedent also confirms that the Commission may choose to classify

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7 *USTelecom v. FCC*, 825 F.3d 674, 704 (D.C. Cir. 2016) (noting that such an argument "clearly fails in light of *Brand X*, which held that classification of broadband as an information service was permissible"), *reh'g en banc denied*, 855 F.3d 381 (D.C. Cir. 2017) ("*USTelecom Rehearing Denial*").

8 *Id*.

9 *U.S. Telecom Rehearing Denial*, 855 F.3d at 384 (Srinivasan, J. and Tatel, J., concurring).

10 *Id.*

11 47 U.S.C. § 153(24).

BIAS as an information service based on the determination that a light-touch regulatory framework under Title I will best effectuate the critical policy goals of promoting broadband investment, deployment, and adoption.[12] In short, the APA provides ample latitude for the Commission to restore the longstanding Title I classification for BIAS.

B. The Factual Particulars of BIAS Support an Information-Service Classification

1. The Capabilities of BIAS Fall Squarely Within the Statutory Definition of an Information Service

As the NPRM recognizes, BIAS satisfies each aspect of the Act's definition of an "information service."[13] In *Brand X*, the Supreme Court made clear that "[t]he entire question" under the Communications Act "turns . . . on the factual particulars of how Internet technology works and how it is provided."[14] As the Commission concluded in its *1998 Report to Congress*,[15] its *Cable Modem Order* in 2002,[16] and in subsequent orders,[17] BIAS providers are

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12 *See, e.g.*, *Brand X*, 545 U.S. at 981 (holding that the Commission "must consider varying interpretations and the wisdom of its policy on a continuing basis . . . for example, in response to … a change in administrations").

13 *See NPRM* ¶¶ 26-28.

14 *Brand X*, 545 U.S. at 991

15 *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 ¶ 41 (1998) ("*1998 Report to Congress*") ("When an entity offers subscribers the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications,' it does not *provide* telecommunications; it is *using* telecommunications.").

16 *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 ¶ 38 (2002) ("*Cable Modem Order*") (determining that, while "cable modem service provides the[se] [information-processing] capabilities . . . 'via telecommunications,'" the telecommunications component is not "separable from the data-processing capabilities of the service").

17 *See, e.g.*, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 ¶ 9 (2005) (concluding that "[w]ireline broadband Internet access service … is a functionally

best understood as offering an inextricable combination of information processing and transmission.

The core functions that BIAS providers offer consumers include each type of information-processing listed in the definition of information service.[18] Perhaps most obviously, BIAS offers consumers the capability to "acquir[e]" and "retriev[e]" information from websites and other sources of online content. BIAS also includes the capability to "stor[e]" information, such as by enabling customers to upload photos, emails, or music for storage in the cloud. Consumers use BIAS to "generate[]" and "mak[e] available" information by creating and uploading content on social media sites, video-sharing platforms, blogs, and other online platforms. And consumers "transform[]," "process[]," and "utiliz[e]" information using their broadband service each time they interact with stored data. Of course, edge providers *also* play an important role in offering these capabilities, as web-based services also must perform functions to enable consumers to acquire, store, and retrieve information. But the critical point is that the combination of transmission and information-processing offered by the BIAS provider is

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integrated, finished service that inextricably intertwines information-processing capabilities with data transmission such that the consumer always uses them as a unitary service."); *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13281 ¶ 1 (2006) (finding that for Broadband over Power Line ("BPL") service "the transmission component underlying BPL-enabled Internet access service is telecommunications,' and that the offering of this telecommunications transmission component as part of a functionally integrated, finished BPL-enabled Internet access service offering is not a 'telecommunications service'"); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 ¶ 26 (2007) (determining that, "wireless broadband Internet access service offers a single, integrated service to end users, Internet access, that inextricably combines the transmission of data with computer processing, information provision, and computer interactivity, for the purpose of enabling end users to run a variety of applications.")

[18] 47 U.S.C. § 153(24) (defining information service as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications").

instrumental in making such functions possible by enabling consumers to interact with edge services. Indeed, in upholding the prior information-service classification of cable broadband services, the Supreme Court recognized that BIAS providers offer these information-service capabilities in a manner that inextricably combines broadband transmission,[19] and nothing material has changed regarding these core capabilities since that time.

In addition to these customer-facing information-service capabilities inherent in web browsing, BIAS entails the provision of less visible but equally vital information-processing capabilities such as caching, Domain Name System ("DNS") service, and Dynamic Host Configuration Protocol ("DHCP") functionality, as well as security features such as spam filtering and distributed denial-of-service ("DDoS") protection. When BIAS providers cache content, i.e., "the storing of copies of content at locations in the network closer to subscribers than their original sources,"[20] they provide information-storage and -retrieval capabilities that the Supreme Court recognized to be functionally integrated with the broadband transmission functionality.[21] DNS is another functionally integrated information-processing functionality that translates domain names into IP addresses—without which a consumer "cannot reach a third-

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19 *See Brand X*, 545 U.S. 967, 998-99 (2005) (finding reasonable Commission's determination that, "[w]hen an end user accesses a third-party's Web site … he is equally using the information service provided by the cable company that offers him Internet access as when he accesses the company's own Web site, its e-mail service, or his personal Web page"); *id.* at 987-89 (explaining that cable broadband service is a single, integrated information service because "it provides consumers with a comprehensive capability for manipulating information using the Internet"); *id.* at 987 (observing that BIAS "enables users, for example, to browse the World Wide Web, to transfer files from file archives on the Internet via the 'File Transfer Protocol,' and to access e-mail and Usenet newsgroups").

20 *Cable Modem Order* ¶ 17 n.76.

21 *Brand X*, 545 U.S. at 999-1000.

party's Web site."[22] DNS also helps "validate[] the correctness of the domain name to IP address mapping," "protects users from man in the middle [] attacks," and directs traffic from "Content Delivery Network users to the nearest and/or fastest location."[23] DHCP enables BIAS providers to send basic configuration information to a remote host and is used to assign IP addresses dynamically to consumer devices when they connect to the Internet; without it, BIAS subscribers would be unable to connect to other IP-based servicers.[24]

Cox and other broadband providers also offer additional integrated features such as dynamic routing (which provides faster and more reliable access to content while bypassing congested links, such as might occur during a DDoS attack), parental controls, spam protection, firewalls, and access network encryption, all of which entail the types of information-processing that distinguish an information service from a telecommunications service. Cox's enhanced security, including encryption between the customer's cable modem and the CMTS equipment in Cox's network, protects consumers from theft of service within the access network, and Cox also can facilitate virtual private networks and more advanced security such as Secure HTTP. These dynamic routing and enhanced security features, along with caching, harness core information-processing capabilities to improve the quality of service available to consumers, for example by optimizing routing of data and thereby increasing the overall reliability of the connection. Consistent with these broad capabilities, Cox's broadband marketing focuses not only on transmission speeds but also on advanced connectivity features, including the wall-to-wall range of Cox's "Panoramic WiFi," Cox Security Suite Plus, WebMail, and SpamBlocker services.

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22 *Id.* at 999.

23 Letter from Richard Bennett to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 8 (Dec. 30, 2014) ("Bennett Letter").

24 *Id.* at 4.

These capabilities do not fall within the "telecommunications management" carve-out from the definition of "information service,"[25] because they do not merely "manag[e]" a telecommunications service, but instead enable and enhance consumers' access to, and use of, information online. The Commission and the Department of Justice argued in *Brand X* that the capabilities discussed above are inherently part of the service offered to consumers, rather than mere back-end management,[26] and the Supreme Court expressly upheld that reasoning.[27] While the *USTelecom* court accepted the Commission's later about-face, treating DNS and caching as management functions, the court's recognition that those same features constitute distinct information services when offered by third parties undermines the conclusion that they suddenly transform into "telecommunications management" when offered by ISPs.[28]

2. BIAS Does Not Entail a Stand-Alone Offering of Telecommunications

As the *NPRM* notes, concluding that BIAS is best considered an information service under the Act necessarily means that it cannot also qualify as a telecommunications service. The Commission long ago "concluded that Congress formally codified information services and

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25 47 U.S.C. § 153(24) (excluding from the definition of information service a "capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service").

26 *See* Fed. Petitioners' Reply Brief at 6 n.2, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 S. Ct. 967 (2005) (No. 04-277), 2005 WL 640965 (noting that DNS and caching "do[] not fall within the statutory exclusion" for telecommunications management and are "*not* used 'for the management, control, or operation of a telecommunications network' but instead provide information-processing capabilities . . . used to facilitate the information retrieval capabilities that are inherent in Internet access").

27 *See Brand X*, 545 U.S. at 999 n.3 (rejecting dissent's argument that "DNS does not count as use of the information-processing capabilities of Internet service because DNS is 'scarcely more than routing information, which is expressly excluded from the definition of 'information service'").

28 *USTelecom*, 825 F.3d at 706.

telecommunications services as two, mutually exclusive types of service in the Telecommunications Act."[29] As an information service, a BIAS provider *makes use of* "telecommunications"—i.e., it provides information-processing capabilities "via telecommunications"[30]—but it does not separately *offer* "telecommunications" on a stand-alone basis to the public.[31]

Even apart from the mutually exclusive nature of the definitions of information service and telecommunications service, the definition of "telecommunications service"—which requires transmission of information *without* "change in the form or content"[32]—does not appropriately describe BIAS because providers "routinely change the form or content of the information sent over their networks—for example, by using firewalls to block harmful content or using protocol processing to interweave IPv4 networks with IPv6 networks."[33]

Nor do BIAS providers offer a capability for end users to transmit information "between or among points specified by the user."[34] Instead, with BIAS, "routing decisions are based on the architecture of the network, not on consumers' instructions, and consumers are often unaware of where online content is stored."[35] Moreover, unlike the public switched telephone network, which enables "an interaction between persons using telephone handsets that are essential

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29 *NPRM* ¶ 40.

30 47 U.S.C. § 153(24).

31 *See Brand X*, 545 U.S. at 990-92; *1998 Report to Congress* ¶ 41 ("When an entity offers subscribers the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications,' it does not *provide* telecommunications; it is *using* telecommunications." (emphases added)).

32 47 U.S.C. § 153(50).

33 *NPRM* ¶ 30.

34 47 U.S.C. § 153(50).

35 *NPRM* ¶ 29.

elements of the telephone network" (thus offering pure transmission subject to end user control), providing BIAS entails "continual interaction between computers and the transmission network as well as between computers and each other," over which end users have no say.[36]

C. The Commission's Policy Goals Also Warrant Restoring the Information Service Classification for BIAS

Classifying BIAS as an information service not only faithfully construes the relevant statutory definitions, but has proven to be a remarkably successful approach for fostering the virtuous circle of innovation, growing demand for online content and applications, and encouraging broadband deployment. The Commission's Title I classification decisions and accompanying light-touch regulatory framework created a conducive climate for investment and innovation. Since 1996, BIAS providers have invested a staggering $1.5 trillion,[37] turning the Internet into the engine of economic, social, and cultural opportunity it represents today.

The fruits of such massive infrastructure investments have been plentiful. Broadband providers have continually expanded the reach of their networks to reach ever-higher percentages of the population, as Internet connections grew from approximately 42 million to more than 320 million between 2005 and 2014.[38] During roughly the same period, cable broadband providers

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36 Bennett Letter at 2.

37 *NPRM* ¶¶ 1-2.

38 *See Internet Access Services: Status as of Jun. 30, 2009,* at 6, Table 1, *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-301294A1.pdf (reporting total Internet connections in June 2005 above 200 kbps); *Internet Access Services: Status as of Dec. 31, 2014,* at 4, Figure 1, *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-338630A1.pdf (reporting total Internet connections in December 2014).

increased maximum download speeds by 3,200 percent.[39] By 2014, 85 percent of the U.S. population had access to download speeds of 100 Mbps or more.[40]

The growth in edge services enabled by increasingly robust and ubiquitous broadband networks has been just as dramatic. By the end of 2014, venture capital funding for Silicon Valley reached nearly $20 billion, up from roughly $6 billion in 2005.[41] Among other innovations, the rise of video streaming services has been particularly noteworthy. By 2015, more than 88 million Americans subscribed to an online video distribution service—a category that did not even exist a decade earlier.[42] And the percentage of Internet traffic devoted to online video spiked from 12 percent to 76 percent between 2006 and 2015.[43]

Despite this extraordinary track record and the absence of any meaningful evidence of anticompetitive conduct by BIAS providers,[44] the Commission departed from its longstanding

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39 *See* NCTA, "Preview the State of America's Broadband Ahead of President Obama's Visit to Iowa," Jan. 15, 2015, *available at* https://www.ncta.com/platform/broadband-internet/preview-the-state-of-americas-broadband-ahead-of-president-obamas-visit-to-iowa/.

40 *See* Roslyn Layton, *When It Comes To High-Speed Internet, The Grass Isn't Greener In Europe*, Forbes, Feb. 7, 2014, *available at* http://www.forbes.com/sites/realspin/2014/02/07/when-it-comes-to-high-speed-internet-the-grass-isnt-greener-in-europe/.

41 Egon Terplan and Kathryn Mullins, "Prosperity and Opportunity in the Bay Area's Innovation Economy," San Francisco Bay Area Planning and Urban Research Association, Mar. 2, 2015, *available at* http://www.spur.org/news/2015-03-02/prosperity-and-opportunity-bay-area-s-innovation-economy.

42 *See, e.g.*, Tom Fitzgerald, *Pay Cable vs. SVOD: How They Stack Up*, Media Life, Jan. 28, 2016, *available at* http://www.medialifemagazine.com/pay-cable-vs-svod-stack/.

43 *See* Cisco Visual Networking Index (2007-2012); Cisco Virtual Networking Index (2015-2020).

44 *See, e.g.*, NPRM, Statement of Chairman Pai (explaining that harms supposedly justifying heavy-handed regulation were illusory); *Title II Order* at 5933 (Pai Dissent) (same); *Verizon*, 740 F.3d at 664-65 (noting absence of demonstrated harms to competition or consumers) (Silberman, J., dissenting). *See also infra* Section II.A.

light-touch approach in the *Title II Order* and thereby "put at risk online investment and innovation, threatening the very open Internet it purported to preserve."[45] Cox's own experience illustrates the dampening effects of the *Title II Order*, as Cox has been forced to recalibrate its investment strategy for broadband based on concerns that capital outlays could be jeopardized by the overly expansive and uncertain regulatory framework imposed by that order. A hostile regulatory climate can be particularly relevant for multi-sector holding companies, like Cox Communications' parent company Cox Enterprises, that can readily choose to invest in business opportunities without similar burdens.[46]

The prospect of aggressive enforcement action based on poorly defined standards, as illustrated by questionable allegations pursued by the prior Commission, also has forced Cox to approach the development and launch of new product and service features with greater caution, thereby impacting its ability to quickly meet the ongoing demands of its customers within a highly competitive marketplace.[47] By the same token, Cox has been forced to devote additional resources to assessing compliance risks under the vague and boundless General Conduct Standard, thus increasing the costs and complexity of providing broadband services. The net effect of Title II for Cox has been to create new hurdles to consumer-friendly innovations and economically beneficial investments.

More broadly, the evidence compiled to date leaves no doubt that the *Title II Order* has slowed broadband investment and put the future of broadband innovation at risk. Because

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45 *NPRM* ¶ 4.

46 *See, e.g.*, Letter from Barry Ohlson to Marlene H. Dortch, FCC, GN Docket No. 14-28 (filed Feb. 5, 2015).

47 *See, e.g.*, NPRM ¶ 44 ("As providers have devoted more resources to complying with new regulations, the threat of regulatory enforcement of vague rules and standards has dampened providers' incentive to invest and innovate.").

investment decisions are often made years in advance, with complex capital investments made based on predictive judgments regarding opportunities to obtain a sufficient return over time, the relatively brief period since the adoption of the *Title II Order* and related judicial proceedings provides a limited window to assess its economic effects. Nevertheless, the record compiled to date demonstrates that Title II already has had a material adverse impact on overall broadband investment. According to one study cited by the Commission, in the wake of the imposition of Title II regulation, BIAS providers have already decreased their capital expenditures by "$3.6 billion, a 5.6% decline relative to 2014 levels."[48] The wireless industry similarly found that capital expenditures decreased by more than 17% over the same time period.[49] Even the threat of Title II reclassification between 2011 and 2015 has been found to have "reduced telecommunications investment by 20% (or more), or about $32 to $40 billion annually."[50]

Not surprisingly, this slowdown in investment is producing corresponding declines in the rate at which broadband speeds increase. A recent study by Dr. George Ford found "a statistically significant decline in the rate of average broadband speed increases for the U.S." following the *Title II Order*.[51] The same study concluded that, if not for the *Title II Order*, "U.S. broadband speeds would have been about 10% higher—or about 1.5 Mbps faster—on

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48 *NPRM* ¶ 45 (citing Hal Singer, *2016 Broadband Capex Survey: Tracking Investment in the Title II Era* (Mar. 1, 2016), https://haljsinger.wordpress.com/2017/03/01/2016-broadband-capex-survey-tracking-investment-in-the-title-ii-era).

49 CTIA, Annual Year-End 2016 Top-Line Survey Results at 5, https://www.ctia.org/docs/default-source/default-document-library/annual-year-end-2016-top-line-survey-results.pdf?sfvrsn=2.

50 George S. Ford, *Net Neutrality, Reclassification and Investment: A Counterfactual Analysis* (Apr. 25, 2017), available at http://www.phoenix-center.org/perspectives/Perspective17-02Final.pdf.

51 George S. Ford, *Broadband Speeds Post-Reclassification: An Empirical Approach* 1 (Jun. 27, 2017), http://www.phoenix-center.org/perspectives/Perspective17-07Final.pdf.

average."[52] Dr. Ford thus concluded that the imposition of Title II regulation "has broken the virtuous circle" rather than advancing it.[53]

While defenders of Title II have asserted that the significant increase in regulation has not adversely affected investment levels, they rely on cherry-picked data and commit obvious analytical errors. For example, Free Press goes so far as to claim that broadband investment has *increased* in the wake of the *Title II Order*,[54] but such assertions are easily rebutted. The Information Technology & Innovation Foundation ("ITIF") has analyzed Free Press's report and concluded that methodological flaws led to significant errors and inaccuracies in its conclusions.[55] Unlike the Singer analysis cited in the *NPRM*, Free Press failed to control for "obvious external factors that have nothing to do with Title II."[56] A separate analysis by Dr. George Ford likewise identified many of the same analytical defects in the claims of Free Press and other defenders of Title II, concluding that their assertions "present a highly distorted view"

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52 *Id.* at 1.

53 *Id.* at 1-2.

54 *See* S. Derek Turner, *It's Working: How the Internet Access and Online Video Markets Are Thriving in the Title II Era*, Free Press (May 2017), https://www.freepress.net/sites/default/files/resources/internet-access-and-online-video-markets-are-thriving-in-title-II-era.pdf; *see also* Internet Ass'n, *Preliminary Net Neutrality Investment Findings* (May 2017), https://internetassociation.org/wp-content/uploads/2017/05/InternetAssociation-NetNeutrality-Facts.pdf.

55 *See* Doug Brake, ITIF, *Broadband Myth Series, Part 1: What Financial Data Shows About the Impact of Title II on ISP Investment* (Jun. 2, 2017), https://itif.org/publications/2017/06/02/broadband-myth-series-part-1-what-financial-data-shows-about-impact-title-ii.

56 *Id.* (explaining that Free Press's data was flawed based on the failure to account for: "(1) the mid-period change in how Sprint treats handsets for accounting purposes . . . , (2) AT&T's investment in Mexico . . . , and (3) AT&T's investment in DirecTV").

of the available evidence on investment.[57] Indeed, Dr. Ford noted Free Press's efforts to "selectively edit" BIAS providers public disclosures in a manner that supports a "false narrative on Internet regulation and investment."[58]

Ultimately, even if defenders were able to show that broadband investment has remained flat (rather than declining) following the *Title II Order*, financial analysts have shown that they fail to appreciate that stagnant investment levels in the face of increasing revenues "represent[], essentially, a cut to investment."[59] "This is because absent these rules, new models could emerge that would save consumers and businesses money while providing the network returns required to justify further network expansion and investment and a better experience for all."[60] Thus, contrary to the assertion that flat investment figures somehow prove that "nothing was harmed," "[t]he real investment number should be 10%-20% higher than the [existing base] and grow from there."[61] The investment data underscore the wisdom of Justice Breyer's observation that "well-meaning, intelligent regulators, trying to carry out their regulatory tasks sensibly, can nonetheless bring about counterproductive results."[62]

Fortunately, under its current leadership, the Commission now recognizes that overly intrusive regulations jeopardize opportunities to achieve a reasonable return on investment, and

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57 George S. Ford, *Below the Belt: A Review of Free Press and the Internet Association's Investment Claims* 2 (Jun. 20, 2017), http://www.phoenix-center.org/perspectives/Perspective17-06Final.pdf.

58 *Id.* at 2-5.

59 *See* Frank Louthan, Raymond James, *Title II Late; The Damage Assessment for Telecom Begins* 1 (Feb. 27, 2015).

60 *Id.*

61 *Id.*

62 Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation*, at 11 (Harvard University Press, 1995).

that, as a result, "Internet service providers have pulled back on plans to deploy new and upgraded infrastructure and services to consumers."[63] The Commission now has a vital opportunity for a course correction that will redound to the benefit of consumers and the economy as a whole.

II. THE COMMISSION HAS MULTIPLE OPTIONS FOR PROTECTING THE OPEN INTERNET WHILE PROMOTING INVESTMENT AND INNOVATION

Once the Commission reclassifies BIAS as a Title I information service, it will have several options available for establishing an appropriate light-touch framework to ensure continued adherence to open Internet principles. As noted, the best solution for protecting the open Internet over the long term is for Congress to enact narrowly tailored legislation codifying consensus principles of openness. For more than a decade, the Commission has attempted to build a durable and legally sound framework for protecting the open Internet. Unfortunately, these efforts have been hamstrung by a statutory framework that does not conclusively resolve the appropriate treatment of BIAS. As a result, the Commission's efforts have fostered recurring cycles of litigation and uncertainty that hampers the broadband deployment goals the Commission is striving to advance. Only Congress can enact decisive and appeal-proof rules that memorialize consensus principles of openness. But even in the absence of such legislation, market forces, together with an appropriate regulatory backstop, if needed, will ensure that BIAS providers continue to operate in accordance with those consensus principles.

A. BIAS Providers Have Strong Market-Based Incentives To Adhere to Open Internet Principles

As a threshold matter, the Commission should recognize that a wide array of BIAS providers (including Cox) and their industry associations have made prominent and unequivocal

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63 *NPRM* ¶ 4.

commitments to remain transparent and to refrain from blocking, throttling, or other anticompetitive conduct.[64] Such commitments flow naturally from BIAS providers' strong incentives to deliver the Internet experience their customers seek—including the ability to use whatever devices and to access whatever lawful online content and services they choose. While the *Title II Order* rested in part on a presumption that BIAS providers have contrary incentives to *harm* their customers' interests, there is simply no economic or even anecdotal support for that theory.

The *Title II Order* notably failed to make any finding of market power or market failure. Indeed, far from exhibiting signs of market failure, the broadband arena is more competitive today than ever before. The Commission's broadband reports confirm that virtually all Americans have a choice of at least two BIAS providers; even if mobile providers are artificially excluded, 97 percent of census blocks are served by at least two fixed broadband providers offering downstream speeds of 10 Mbps or greater, and 79 percent of census blocks have three or more providers offering such speeds.[65] Fueled by such competition, BIAS providers have continually expanded the reach of their networks, increased broadband speeds, and otherwise improved their services, as noted above.[66] Even in the course of imposing Title II regulation, the Commission acknowledged that BIAS providers have made substantial investments in upgraded infrastructure and service enhancements in response to "'increased end-user demand for

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64 *See, e.g.*, NCTA, *Reaffirming Our Commitment to an Open Internet*, Platform (May 17, 2017) (reiterating industry commitment to "an open Internet that gives [consumers] the freedom to be in charge of [their] online experience," and pledging never to "block throttle, or otherwise impair" consumers' online activity), *available at* https://www.ncta.com/platform/public-policy/reaffirming-our-commitment-to-an-open-internet/.

65 *See* FCC, "Internet Access Services: Status as of June 30, 2016," at 6 (Apr. 2017), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-342358A1.pdf.

66 *See supra* at 14.

broadband.'"[67] For example, Cox has begun offering customers in many of its markets "Gigablast Internet," delivering download speeds of up to 1 gigabit per second. In other words, BIAS providers have acted procompetitively. By contrast, a BIAS provider that fails to adhere to principles of openness, thereby upsetting consumer expectations, would risk driving customers to rival providers.[68]

The experience of the last decade-plus confirms that market forces have successfully enshrined open Internet principles to the point that even assertions of harmful conduct are remarkably rare. As Judge Silberman observed in *Verizon*: "That the Commission was able to locate only four potential examples of such conduct is, frankly, astonishing. In such a large industry . . . one would think there should be ample examples of just about any type of conduct."[69] Chairman Pai similarly has noted that "[t]hese utility-style regulations … were and are like the proverbial sledgehammer being wielded against the flea—except that here, there was no flea."[70]

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67 *Title II Order* ¶ 77 (quoting *2010 Open Internet Order* ¶ 14).

68 *See, e.g.*, *USTelecom v. FCC*, No. 15-1063, Order Denying Rehearing *En Banc*, Concurring Opinion of Judges Srinivasan and Tatel, at 16 (May 1, 2017) (noting that a service provider that "filter[s] its customers' access to web content based on its own priorities might have serious concerns about its ability to attract subscribers").

69 *Verizon*, 740 F.3d at 664-65 (Silberman, J., dissenting).

70 *NPRM*, Statement of Chairman Pai; *see also Title II Order* at 5933 (Pai Dissent) ("The evidence of these continuing threats? There is none; it's all anecdote, hypothesis, and hysteria. A small ISP in North Carolina allegedly blocked VoIP calls a decade ago. Comcast capped BitTorrent traffic to ease upload congestion eight years ago. Apple introduced FaceTime over Wi-Fi first, cellular networks later. Examples this picayune and stale aren't enough to tell a coherent story about net neutrality. The bogeyman never had it so easy.").

B. Core Open Internet Principles Can Be Effectively Enforced by the FTC

While BIAS providers' strong incentives to continue operating in accordance with open Internet principles calls into question the need for regulatory intervention, Cox has long recognized the propriety of maintaining a regulatory backstop to ensure consistent, industry-wide compliance. One option, as proposed by the NPRM, is to rely on FTC oversight and enforcement of industry commitments and marketing claims.[71] As noted, Cox and other BIAS providers have already made firm commitments to uphold the open Internet principles, and BIAS providers can incorporate such commitments as binding promises in their terms of service and other customer agreements, or through an industry-wide code of conduct.

Specifically, the Commission could encourage all BIAS providers to commit to maintain the core principles of transparency, no blocking, no throttling, and no anticompetitive paid prioritization. In turn, those commitments will be enforceable through both industry self-regulation and by the FTC under Section 5 of the FTC Act, which prohibits "[u]nfair methods of competition, and unfair or deceptive acts or practices."[72] Critically, reversing the Title II reclassification will restore the FTC's authority to oversee broadband providers' conduct—including open Internet and privacy and data security practices. Before the *Title II Order*, the FTC was an effective cop on the beat, but the ill-conceived common-carrier designation had the effect of excluding BIAS providers from FTC oversight.[73] The FTC has extensive experience policing the assurances companies make to their customers and enforcing industry

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71 *NPRM* ¶¶ 76-77.

72 15 U.S.C. § 45(a).

73 *Id.* § 45(a)(2).

commitments.[74] Just as the FTC today ensures that companies "live up [their] promises" to safeguard personal information,[75] the FTC would carefully monitor the behavior of BIAS providers to ensure that the open Internet principles are being upheld. In the event of any abusive conduct, the FTC could pursue substantial penalties and ensure remedial action.

One significant advantage of an FTC-led enforcement regime would be that, unlike this Commission's historical preoccupation with the conduct of BIAS providers and its unwillingness to consider or respond to potentially harmful conduct by others, the FTC would be able to apply consistent standards to *all* participants that operate interdependently in the Internet ecosystem to meet consumer expectations. In particular, the FTC would be able to prevent unfair or deceptive practices not only by BIAS providers, but by edge providers, backbone providers, and content delivery networks, thus helping ensure a level playing field, regardless of the size of the participant or the role it plays. Particularly given that large edge providers have greater market power than BIAS providers such as Cox and have more of a track record of departing from "neutral" conduct,[76] the prospect of a harmonized FTC enforcement regime holds significant promise for consumers. For all these reasons, relying on industry commitments backed by FTC oversight and enforcement would offer an appropriate and effective way to reinstate the type of

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74 *See, e.g.*, Letter of Jessica L. Rich, FTC, to Marlene H. Dortch, FCC, MB Docket No. 16-42, CS Docket No. 97-80, at 3-4 (filed Apr. 22, 2016). Through the Office of Technology Research and Investigation (OTRI), an office that researches information on technology's impact on consumers, the FTC is equipped to protect consumers while fostering innovation.

75 Enforcing Privacy Promises, FTC, https://www.ftc.gov/news-events/media-resources/protecting-consumer-privacy/enforcing-privacy-promises (last visited July 15, 2017).

76 *See, e.g.*, Comments of NCTA, GN Docket Nos. 14-28 and 10-127, at 15-16 (July 15, 2014).

light-touch regulation that gave rise to the virtuous circle of investment and innovation that enabled the Internet economy to prosper.

C. If the Commission Determines That Prescriptive Rules Are Necessary, It Could Choose To Adopt Updated Bright-Line Rules Pursuant to Section 706

If the Commission determines down the road, after experience with FTC-backed principles, that prescriptive rules are needed to better safeguard Internet openness without harming investment and innovation, it could decide to adopt bright-line rules based on the blueprint provided by the *Verizon* court. The D.C. Circuit has held that Section 706 provides the Commission with authority to address open Internet issues, including by establishing bright-line rules that directly advance the broadband deployment goals embodied in the statute.[77] Section 706 directs the Commission to take action to "encourage the deployment of broadband telecommunications capability."[78] The *Verizon* court agreed with the Commission that Internet openness fosters a "virtuous circle" of investment and innovation in broadband networks, and therefore found that protecting openness through enforceable rules is within the Commission's authority under Section 706.[79] At the same time, the court recognized that the Act prohibits the Commission from regulating information service providers as common carriers.[80] And the Administrative Procedure Act requires the Commission to cogently explain the nexus between any rules it adopts and the relevant statutory objectives.[81] In reclassifying BIAS as a Title I information service, the Commission would be subject to those limitations with respect to any

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77 *Verizon*, 740 F.3d at 635-42.

78 *Id*. at 634; 47 U.S.C. § 1304.

79 *Verizon*, 740 F.3d at 644.

80 *Id*. at 650.

81 *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

new framework it might seek to impose, but the court provided clear direction for how the core rules can be reinstated without running afoul of the statute.[82]

Reestablishing rules under Section 706 would entail relatively modest changes to the bright-line rules initially adopted in 2010. As an initial matter, the *Verizon* decision upheld the 2010 version of the Transparency Rule, finding that it did not implicate the common carrier limitation,[83] so that prior rule could be reinstated without change (or with whatever minor revisions the Commission now deems appropriate based on the updated record). The Commission should eliminate the so-called "enhancements" adopted in the *Title II Order*, however, because they impose far greater burdens than benefits, as Cox and others have previously explained.[84] The transparency requirements adopted in the *2010 Open Internet Order* "ensure that ample information about broadband service attributes will remain available to consumers, enabling them to make fully informed decisions about the broadband services available in the marketplace."[85] By contrast, the further information that the *Title II Order* requires providers to disclose consists of highly technical information that is costly to report yet provides no meaningful benefits to consumers.

The Commission also would have reasonable arguments in support of reinstating the *prohibitions* embodied in the bright line rules it adopted in 2010 pursuant to Section 706. In particular, the Commission could prohibit BIAS providers from blocking or throttling lawful

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82 *Verizon*, 740 F.3d at 657-58.

83 *Id.* at 659.

84 *See, e.g.*, Comments of Cox Communications, Inc., GN Docket Nos. 14-28 and 10-127, at 20-23 (July 15, 2014).

85 Letter from Rick Chessen, Senior Vice President, Law and Regulatory Policy, NCTA, and Jonathan Banks, Senior Vice President, Law and Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 14-28, at 3 (filed Aug. 5, 2015).

Internet traffic, if it determines that such action is necessary and would promote broadband deployment. Although the *Verizon* court vacated the 2010 no-blocking rule because the Commission drew "no distinction at all between the anti-discrimination [rule]" the court deemed a form of common carriage and the "anti-blocking rules," the court's decision left ample room for the Commission to reinstate the rule under a revised rationale.[86]

Similarly, with respect to unreasonable discrimination—including anticompetitive forms of paid prioritization—the *Verizon* court indicated that the Commission could address any anticompetitive conduct that may arise pursuant to Section 706 without treating information service providers as common carriers. All that is required is that the Commission leave *some* "room for individualized bargaining."[87] Accordingly, the Commission could choose to impose a presumptive ban on the types of paid prioritization arrangements it deems anticompetitive—for example, prohibiting exclusive paid prioritization of an affiliated entity's Internet content[88]—while preserving flexibility for providers to explore business arrangements that would deliver net benefits to consumers.

Indeed, especially because no BIAS provider has actually introduced a paid prioritization offering in the marketplace, there is no sound reason to include, *ex ante*, that all forms of prioritization necessarily would be harmful. For example, it is hard to understand why prioritization of traffic from a telehealth clinic, so that high-definition video images of a patient's

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86 *Verizon*, 740 F.3d at 658 (indicating that the Commission could prohibit blocking (or, by extension, throttling) as long as it otherwise "leave[s] sufficient 'room for individualized bargaining and discrimination in terms' so as not to run afoul of the statutory prohibitions on common carrier treatment") (quoting *Cellco Partnership v. FCC*, 700 F.3d 534, 548 (D.C. Circ. 2012)).

87 *Id.*

88 *See* Reply Comments of Cox Communications, Inc., GN Docket Nos. 14-28 and 10-127, at 16 (Sept. 15, 2014) (citing Comcast Comments at 23-24, Verizon Comments at 38, and AT&T Comments at 31-37).

cardiac procedure could take precedence over less time-sensitive traffic, would pose a threat to competition or consumers. Moreover, as Judge Silberman recognized in *Verizon*, pretending that "aggressive, prophylactic regulation" will not have negative consequences is "quite wrong," in part because the Commission might well end up proscribing beneficial conduct.[89] The Justice Department and the FTC both have reached the same conclusion in the past, recognizing "the inherent difficulty in regulating based on concerns about conduct that has not occurred, especially in a dynamic marketplace,"[90] and therefore warning that the premature imposition of regulatory constraints on "dynamic and evolving services" absent a clear showing of harm "can inefficiently skew investment, delay innovation, and diminish consumer welfare."[91] For these reasons, while Cox would support banning paid prioritization arrangements with attributes deemed anticompetitive in the event the Commission chooses to reinstate bright-line rules, there is no sound policy basis to impose a categorical ban on any and all forms of paid prioritization.[92]

D. The Commission Should Treat Fixed and Mobile BIAS Providers Comparably

Regardless of the type of framework the Commission elects to adopt, it should ensure comparable treatment of fixed and mobile BIAS providers. Cox has long supported such regulatory parity, and it is more apparent than ever before that it is necessary to prevent serious marketplace distortions. As the capabilities of mobile broadband services continue to increase,

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89 *Verizon*, 740 F.3d at 667 (Silberman, J., dissenting).

90 FTC Staff Report, *Broadband Connectivity Competition Policy*, at 157 (June 2007).

91 Ex Parte Filing of the United States Department of Justice, WC Docket No. 07-52, at 2-3 (Sept. 6, 2007).

92 Moreover, to the extent the Commission imposes limits on paid prioritization, it should reaffirm that such restrictions apply only to the last-mile BIAS service, and not to a BIAS provider's backbone network, content-delivery network, or enterprise services. In those contexts, ensuring quality of service through prioritization is necessary to deliver desired service levels, consistent with customer expectations, and unequivocally procompetitive.

and with 5G services on the near-term horizon, consumers increasingly view fixed and mobile services as interchangeable. In such a competitive environment, it would make no sense to impose different requirements on fixed and mobile platforms. If the Commission follows through with its proposal to reclassify mobile broadband as a private mobile service, it should do so in such a way that continues to ensure technologically neutral application of open Internet principles to fixed and mobile services.

In the 2014-15 rulemaking proceedings, Cox argued that fixed and mobile providers should be subject to the same rules,[93] and the Commission's embrace of that principle is one of the few aspects of the *Title II Order* that remains meritorious.[94] Even if some regulatory distinctions between fixed and mobile broadband may have made sense in 2010,[95] those differences have long since dissipated. While mobile providers have argued that the total amount of bandwidth they can provide is constrained by available spectrum, all providers face similar challenges in managing the finite bandwidth available over their networks, and all should be subject to a common set of technologically neutral principles or rules government network management. Both fixed and mobile service providers must engage in "reasonable network management" to ensure that their networks can deliver a diverse array of services with the quality and reliability that customers demand.

Increasingly, consumers are using their smartphones as their primary means to access the Internet. The Pew Research Center found that in 2016, 12% of American adults access the

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93 *See* Comments of Cox Communications, Inc., GN Docket No. 14-28 (filed July 18, 2014).

94 *See Title II Order* ¶ 90.

95 *See 2010 Open Internet Order* ¶¶ 94-95 (recognizing that while mobile broadband was "an earlier-stage platform than fixed broadband," mobile broadband was "experiencing very rapid innovation and change").

Internet only using a mobile device, including 17% of adults aged 18 to 29, 23% of Hispanics, 21% of adults who earn less than $30,000 a year, and 27% of adults without a high school diploma.[96] All of these figures represent substantial year-over-year increases in dependency on mobile broadband.[97] Today's mobile-only customers are largely drawn from vulnerable communities. With the impending arrival of 5G and the accompanying enhancements in speed and reliability, it is all the more apparent that any once-valid justifications for disparate rules can no longer be justified, as even more consumers will rely on mobile devices as their principal means of accessing the Internet. The Commission should recognize, as it has in the past,[98] that any open Internet protections that apply to consumers using fixed broadband services should also apply to consumers who depend on mobile connections.

E. The Commission Should Repeal the General Conduct Standard

Just as regulatory parity for fixed and mobile providers should be a core tenet of any framework the Commission adopts, so too should be elimination of the boundless General Conduct Standard.[99] The *Title II Order* explained that the General Conduct Standard "represents [the Commission's] interpretation of [S]ections 201 and 202 in the broadband Internet access

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96 Pew Research Center, Mobile Fact Sheet (Jan 12, 2017), http://www.pewinternet.org/fact-sheet/mobile/.

97 *Id.*

98 *Title II Order* ¶ 88 (finding that "it would benefit the millions of consumers who access the Internet on mobile devices to apply the same set of Internet openness protections to both fixed and mobile networks"); *see id*. ¶ 92 ("Broadband users should be able to expect that they will be entitled to the same Internet openness protections no matter what technology they use to access the Internet.").

99 *See NPRM* ¶¶ 72-73.

context."[100] Therefore, it is unquestionably a common carrier mandate that the Commission cannot retain once the information-service classified is reinstated.[101]

Nor is there any sound policy reason why the Commission *should* retain that standard. To the contrary, together with the expansive common carrier mandates in Sections 201 and 202 of the Act, the General Conduct Standard is a principal source of uncertainty and associated burdens responsible for chilling investment and innovation. As a relatively small participant in the Internet ecosystem, Cox appreciates that limited government oversight remains appropriate in the broadband marketplace to prevent anticompetitive conduct and other behavior that harms consumers. For that reason, Cox supports FTC oversight under Section 5 of the FTC Act and potential resort to the antitrust laws where conduct that is not proscribed by the bright-line principles discussed above poses a threat to competition or consumers. But the General Conduct Standard is far too expansive to represent an appropriately tailored oversight mechanism. In light of its unbounded nature—under which virtually any practice could be deemed unreasonable based on post-hoc judgments, and could subject the provider to massive liability—the General Conduct Standard counterproductively deters BIAS providers from introducing consumer-friendly service offerings. While that standard has been in place, Cox (like other BIAS providers) has been forced to undertake additional costly and open-ended regulatory reviews to consider whether new products and services could be alleged to run afoul of this extraordinarily vague standard, and has approached such decisions more cautiously. Competition and

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100 *Title II Order* ¶ 137; *see also id.* ¶ 295.

101 *See Verizon*, 740 F.3d at 650 (holding that, in light of the then-applicable information-service classification, "the Commission would violate the Communications Act were it to regulate broadband providers as common carriers").

consumers benefit from innovative experimentation in the marketplace, not risk aversion driven by fears of unpredictable regulatory intervention.

F. The Commission Should Not Seek to Expand the Scope of Regulation Beyond Mass Market BIAS

Another important aspect of any new framework adopted by the Commission will be to limit the scope of any rules or alternative regulatory oversight to mass market (and preferably residential) broadband service. Whether or not the speculative harms asserted with respect to the consumer marketplace can justify prescriptive regulation with respect to BIAS, there is no basis to subject services offered to business customers to open Internet mandates. As the Commission has recently recognized, broadband competition is especially robust in the business marketplace, undermining any purported rationale for increased regulatory intervention.[102] Business customers often negotiate customized services to meet their needs and enter into long-term contracts that specify required service levels, quality of service, and other such attributes. Moreover, business customers "tend to be sophisticated and knowledgeable" and often employ consultants to assist in service selection and contract negotiations.[103] As a result of these structural realities, business customers are adequately protected by market forces, without need for prescriptive mandates or other regulatory measures to safeguard their interests. Indeed, as the Commission has recognized, introducing such regulation in a competitive marketplace often proves counterproductive.[104] Especially because many business customers demand service features to more effectively manage their business environments—e.g., assistance with blocking

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102 *See generally Business Data Services in an Internet Protocol Environment*, Report & Order, 32 FCC Rcd 3459 (2017).

103 *See, e.g., AT&T and BellSouth Corp*., Memorandum Opinion and Order, 22 FCC Rcd 5662, at ¶ 85 (2007).

104 *See, e.g., id.* ¶ 92 (explaining the harms associated with regulatory intervention, even where competition has been slow to emerge).

unwanted content (such as to prevent potential copyright violations)—the Commission should avoid imposing standards that raise questions about BIAS providers' ability to meet their business customers' needs.

Nor is there any sound reason to regulate specialized services (or "non-BIAS data services"), an emerging category that does not even constitute a defined market, let alone one that exhibits signs of market failure. The *Title II Order* established a back door to regulating specialized services by threatening enforcement action if the Commission "determines that these types of service offerings are undermining investment, innovation, competition, and end-user benefits."[105] As with the amorphous General Conduct Standard, that is only a recipe for debilitating uncertainty. Fundamentally, because any specialized services are offered independent of BIAS, the open Internet rules do not and should not apply, and the Commission should confirm as much to avoid chilling investment and innovation. In the *2010 Open Internet Order*, the Commission had made plain that the definition of BIAS does not include services that "do not provide the capability to transmit data to and receive data from all or substantially all Internet endpoints."[106] Returning to that clear guidance would help pave the way for increased experimentation and the associated consumer benefits. To the extent that BIAS providers use their broadband infrastructure to provide video and voice services, those services are regulated in their own right, and with other novel types of service offerings falling outside such traditional categories, there is simply no good reason to intervene.[107]

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105 *Title II Order* ¶ 210.

106 *2010 Open Internet Order* ¶ 47.

107 *See* Ex Parte Filing of the Department of Justice, *supra* n.91 (explaining that imposing prophylactic mandates on "dynamic and evolving services" absent a clear showing of harm "can inefficiently skew investment, delay innovation, and diminish consumer welfare").

Moreover, the Commission should revert to its prior, hands-off approach to Internet interconnection and traffic-exchange arrangements between BIAS providers and other network operators. Once the Title II classification of BIAS is eliminated, so too will the asserted legal basis for regulating Internet interconnection and traffic-exchange fall away.[108] And there is no sound policy justification for regulatory intervention in light of the well-functioning marketplace for interconnection and traffic-exchange. The *Title II Order* made a radical break from a long bipartisan history of applying a deregulatory approach to traffic-exchange arrangements, notwithstanding that, between 2005 and 2015, transit prices fell over 99 percent on a cost-per megabit basis,[109] and CDN pricing has likewise declined substantially over time, including an average reduction of 22 percent in 2016 and 20 percent in 2015.[110] Unlike in the wireline voice arena, where there is a storied history of incumbent LECs' refusing to interconnect on reasonable terms, the Internet is a "network of networks" that has always benefitted from the exchange of traffic over scores of different routes, including many settlement-free peering arrangements. While large providers have occasionally had disputes over the terms under which traffic will be exchanged between their networks, occasional disagreements during complex commercial negotiations between sophisticated parties are not a justification for regulatory intervention. If anything, for providers like Cox, large edge providers that exercise substantial control over their network traffic (and transit providers that carry such traffic) have the upper hand in negotiating traffic-exchange arrangements, illustrating the problems with a one-sided regulatory regime

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108 *See NPRM* ¶ 42.

109 *See* DrPeering International, *What Are The Historical Pricing Trends*, http://drpeering.net/FAQ/What-are-the-historical-transit-pricing-trends.php.

110 *See* Dan Rayburn, *CDN Market Update: Web Performance, DIY, and CDN Pricing Trends*, May 15, 2017, http://www.danrayburn.com/cdn2017.pdf; Dom Robinson, *CDN Market Pricing Down, but Overall Growth Continues*, Streaming Media, May 22, 2017, http://www.streamingmediaglobal.com/Articles/ReadArticle.aspx?ArticleID=118381.

applicable only to BIAS providers.[111] The Commission therefore should implement its proposal to "relinquish any authority" over Internet traffic exchange,[112] while recognizing that antitrust law and potential FTC oversight under Section 5 of the FTC Act will remain available in the event of abusive conduct by any participants in the Internet ecosystem.

G. The Commission Should Confirm That State and Local Laws That Attempt To Regulate BIAS Are Preempted

Finally, the Commission should take steps to reaffirm the applicability of a uniform national approach to ensuring adherence to Internet openness, regardless of the degree to which that framework entails regulation or deregulatory measures. Cox provides broadband service in 18 states and, in so doing, relies on such uniform national policies to provide service on a consistent basis across its footprint without being subject to a patchwork of inconsistent state regulation. Once the Commission restores the information-service classification and a light-touch regulatory framework for BIAS, it should also reaffirm the primacy of federal law in this arena, and in turn its ability and intention to preempt state and local laws that would undermine federal policy.[113]

The Commission has long been clear in designating BIAS as an inherently interstate service,[114] which precludes state utility regulation of BIAS.[115] The proposed information-service

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111 *See* Letter from Barry Ohlson to Marlene H. Dortch, FCC, GN Docket No. 14-28 (filed Feb. 12, 2015) (noting that subjecting only BIAS providers to regulatory oversight introduces "significant competitive distortions," especially for a "mid-sized provider like Cox, which often exchanges traffic with far larger entities").

112 *Id.*

113 *See NPRM* ¶ 69 (seeking comment on how classifying BIAS as "as an interstate information service . . . would . . . impact jurisdiction").

114 *See, e.g., Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶ 59 (2002); *see also 2015 Open Internet Order* ¶ 431.

classification further bolsters the conclusion that state and local government may not regulate BIAS, given the longstanding precedent applicable to enhanced services.[116] Even if the Commission's new framework does not entirely occupy the field with respect to BIAS offerings—for example, leaving room for application of some generally applicable state laws—under the doctrine of conflict preemption, state or local regulation must yield where it "conflicts with [the federal agency's] regulations,"[117] or "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[118]

Notwithstanding such precedent, as Commissioner O'Rielly has recognized, states may seek to impose conflicting requirements that intrude on federal prerogatives with respect to broadband policy.[119] A recent petition filed by NCTA and USTelecom concerning unwarranted state efforts to impose disclosure obligations that conflict with federal standards further

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115 *See, e.g., Ivy Broad. Co. v. Am. Tel. & Tel. Co.*, 391 F.2d 486, 491 (2d Cir. 1968) (interstate communications are "governed solely by federal law and [] the states are precluded from acting in this area").

116 *See, e.g., Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Memorandum Opinion & Order on Further Reconsideration, 88 F.C.C.2d 512 ¶ 83 n.34 (1981) ("States, therefore, may not impose common carrier tariff regulation on a carrier's provision of enhanced services."); *Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry) et al.*, Report & Order, 104 F.C.C.2d 958 ¶ 343 (1986) (explaining that the Commission "preemptively deregulated enhanced services, foreclosing the possibility of state regulation of such offerings").

117 *City of New York v. FCC*, 486 U.S. 57, 64 (1988).

118 *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (citation omitted); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883-84 (2000) (citation omitted).

119 *See NPRM*, Statement of Commissioner O'Rielly at 75 ("If the Commission decides that [BIAS] is an interstate information service, then states and localities should be foreclosed from regulating it, as some states are currently attempting to do with new broadband privacy laws, fees, approval processes, and other requirements.").

underscores this concern.[120] Accordingly, the Commission should ensure that its final order in this proceeding reaffirms the primacy of federal law and makes explicit the limited scope of any permissible action by state and local government. Of particular import, to the extent the Commission determines that refraining from regulation would serve the public interest, such a deregulatory federal policy should have the same preemptive effect as any affirmative regulatory requirements.[121]

CONCLUSION

For the foregoing reasons, the Commission should restore the classification of BIAS as a Title I information service and consider light-touch, balanced, and technologically neutral alternatives for advancing and protecting the open Internet principles.

Respectfully submitted,

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July 17, 2017

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120 *See* Petition for Declaratory Ruling, *Petition for Declaratory Ruling Regarding Broadband Speed Disclosure Requirements*, CG Docket No. 17-131 (filed May 15, 2017).

121 *See, e.g.*, *Nw., Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014) (federal preemption prevents states from "undo[ing] federal deregulation with regulation of their own").